IN THE HIGH COURT OF UTTARANCHAL ATNAINITAL

Court's order whether the case is or not approved for reporting
(Chapter VIII, Rule 32(2) (b)
Description of Case

Crl. Appeal No. 2041 of 2001
(Old No.2613 of 1988)

Date of decision:- 19-5-2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date:- 19-5-2006 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 2041 of 2001
(Old No.2613 of 1988)

Harak Singh
S/o Pratap singh
R/o Village Jameera
Police Station-Tallital
District-Nainital ..Appellant

Versus

State of Uttaranchal ...Appellant

Sri Sobhit Saharia, learned Amicus Curaie for the appellant.
Sri Nandan Arya, Sri R.S. Rautela snd Sri L.M. Verma, learned A.G.A. for the State

Hon'ble J.C.S. Rawat, J.

1. This is an appeal against the judgment and order of Shri A.S. Chaudhari, the then II additional Sessions Judge, Nainital dated 12.10.1988 in Sessions Trial No. 175 of 1998 convicting the appellant u/s 324 I.P.C. and sentencing him to undergo 2 years R.I. Feeling aggrieved by the said judgment and order, the present appeal has been preferred.

2. Brief facts for the disposal of this appeal are that a report was lodged in the Police Station Tallital, Nainital on 01.04.1987 at about 9.25 a.m. alleging there in that the injured Prem Singh was a servent with Bhawan Singh and he was cutting the fodder in the baranda of Bhawan Singh at about 8:00 pm. on 31.03.1987. The employer Bhanwa Singh was sitting in his house and his wife was preparing chapatti inside the house. Meanwhile, the present appellant-Harak Singh having gun in his hand came on the road adjacent to the house of Bhawan Singh and he fired upon the injured Prem Singh with the intention to kill him. The injured Prem Singh sustained the gun shot injuries and he fell down on the ground. The appellant-hark Singh fled away from the place of occurrence. On the next day, the injured-Prem Singh was brought to the police station and hospital and the injured met Jagdish Singh-Sabhapati at Baldiakhan

and he informed about the incident to him and subscribe the report in the police station. Thereafter, the injured was taken to the police station where he lodged the F.I.R. and thereafter he was taken to the hospital where he was examined by the medical Officer Dr. M.N. Dhodiyal. On the medical examination, he found the following in juries on his person:-

1. Punctured wound 1.00 cm. x 1.00 cm on the dorsal aspect of left thigh 10.00 cm. above left knee, margins are inverted with blackening at one margins. Margins are ecchymosed. The wound is covered with a thick dry scale of blood. No pallet could be traced. This is the wound of entrance.

2. Punctured wound 1.00 cm. x 1.00 cm over the dorsal aspect of right thigh 10.00 cm. above right knee margins are inverted. Ecchymosed & blackened. There is a thick, dry scale of blood. On cleaning the wound fresh blood serum comes out. This is would of entrance. The pallet can not be traced.

Punctured wound 1.00 cm x 1.00 cm on the posterior aspect of right thigh 10.5 cm above right knee, margins are inverted & ragged, covered with a thick, dry scale of blood. On cleaning the wound fresh blood comes out from it.

Punctured wound 1.00 cm x 1.00 cm on right knee over the patella, margins are inverted, ecchymosed and blackened. This is wound of entrance. No pallet is traceable. Advised x-ray right knee.

As per the opinion of the doctor, the injuries were gunshot (firearm) injuries about half a day in duration. The injuries were kept under observation.

3. Thereafter, the investigation was started by S.I. Girish Chandra-PW7. After completing the investigation, he submitted the chargesheet.

4. The accused-appellant was charged u/s 307 I.P.C. and he denied the charge and claimed trial.

5. The prosecution is support of its case, examined Jagdish Chandra-PW1 who was the Sabhapati of the village and he scribed the report and her is not the eyewitness of the incident. Prem Singh-PW2 is the injured eyewitness of the incident and he had narrated the total eye account of the incident in his evidence. Dr. M.N. Dhodiyal-PW3 had examined the injured on 01.04.1987 in B.D. Pandey Hospital, Nainital and he had opined that the injured sustained the gun shot injuries and these injuries were possibly to be caused on 31.03.1987 at about 8:00 pm. He had further opined that the injuries may be cause by any fire arm including the gun. Bhawan Singh S/o Lal Singh-PW4 is the employer of the injured-Prem Singh. He was also an eyewitness according to the prosecution. The injured-Prem Singh was working in his house and he was cutting the fodder. He had further stated that he had not seen who had fired upon the injured. He had stated that the injured was working in his baranda and he was cutting the fodder in the light of electricity. He had heard the noise of fire and he saw that the injured Prem Singh fell down on the ground. He had also stated that a blood stained paizama was taken into possession by the police. He did not support the prosecution that he saw the accused-appellant firing upon injured. He had heard the noise of fire and he saw that the injured prem Singh fell down on the ground. He had also stated that a blood stained paizama was taken into possession by the police. He did not support the prosecution that he saw the accused-appellant firing upon injured. He was declared hostile by the prosecution. The prosecution also adduced the evidence of Bhawan Singh s/o Narain Singh as PW5. He had stated in his evidence that he came on the next day to the house of Bhawan Singh-PW4 and he found that Prem Singh had sustained the gun shot injuries on his person. He took the

injured Prem Singh to the hospital. According to the prosecution he was also an eyewitness but he did not support the prosecution. The prosecution has also declared him hostile. Shiv Singh-PW6 is a formal witness who has proved the chick F.I.R. (Ex.Ka-4) and G.D. (Ex.Ka.5) S.I. Girish Chandra-PW7 is the Investigating Officer who had investigated the matter and prepared the site plan, fard recovery of spent cartridges, fard of recovery of paizama from the injured. He also took the process u/s 82/83 Cr.P.C. against the accused and submitted the chargesheet against the accused-appellant as an absconder. He has also sent the gun to the ballistic expert from where it was opined that the said spent cartridges was fired by the same gun.

6. Thereafter, the accused-appellant was examined u/s 313 Cr.P.C. and he denied all the allegations made in the evidence and he has stated that he had been falsely implicated due to the enmity. He had not stated anything except he pleaded that he had been falsely implicated. The appellant had not produced any oral and documentary evidence in his defence.

7. After appreciation of the evidence, the learned Sessions Judge convicted and sentenced the appellant as indicated above.

8. I have heard learned counsel for the parties and perused the record.

9. At the outset it need to be mentioned that it is not disputed that the injured-Prem Singh sustained the injures on the date of the occurrence. Prem Singh-PW2 had himself appeared before the court below and he had stated that the sustained the gun shot injuries on 31.03.1987. Dr. M.N. Dhodiyal-PW3 had also stated that the injured sustained the injuries by fire arm on 31.03.1987 at about 8:00 pm. It

is not disputed that the injured-Prem Singh sustained the gun shot injures on his person.

10. Now, I have to consider whether the appellant-Harak Singh was responsible of the injuries sustained by Prem Singh-injured. Prem Singh was cutting the fodder in the baranda of Bhawan Singh-PW4, the appellant came there and he shot fire upon the injured consequently he fell down on the ground and the appellant fled away from the place of incident. Learned counsel for the defence contended that the accused-appellant had been falsely implicated and he had not caused any injures to the injured-Prem Singh. In support of the prosecution case, the prosecution had adduced the evidence of the injured Prem Singh-PW2. Prem Singh had narrated the entire incident in his evidence as indicated in para 2 of my judgment. He is the star witness of the case. The prosecution had also adduced the evidence of Bhawan singh-PW4, the employer of the injured. However, he was declared hostile and he had not stated that he saw the appellant to fire upon the injured. It is also pertinent to mention here that Prem Singh-PW2 had also stated in his cross examination that Bhawan Singh-PW4 had was sitting in the 1st floor of his house from where the appellant shot fired was not visible. However, Bhawan Singh-PW4 had stated that the injured was cutting fodder in the light of electricity and he heard the gun shot sound and found the appellant grounded due to the said gun shot injuries. He had also stated that paizama of the injured was recovered from the possession of the injured. He had stated that no spent cartridges was recovered in his possession he had only signed on the recovery memo. The prosecution had also adduced the evidence of Bhwana Singh-PW5 who was also declared hostile. He had only stated that Bhawan Singh-PW4 called him to this house in the morning and he saw there Prem Singh-injured had sustained the gun shot injuries. He had taken the injured to the hospital and he had stated that he

was not present at the time of the incident. The learned counsel for the appellant assailed the evidence of the prosecution witnesses on the ground that there are discrepancies in the evidence of the prosecution. He contended that Jagish Chandra-PW1 had stated in his evidence that the said report was dictated to him by the Prem singh-PW2 whereas the injured Prem Singh-PW2 had himself stated that the said report was not dictated but he only informed about the incident. He had also pointed out that the incident took place in the dark night about 8:00 p.m. He further stated "अंधेरा घटना के दिनों पांच छे बजे हो जाता है। उस समेय पूरा अंधेरा था जिस समय मुझे गोली लगी। अंधेरा हुए कम से कम दस धन्टे हो गये थे. "He contended that if the statement is taken correct, the incident would have occurred at about 2:00 am in the morning and not on 8:00 am. He further pointed out that the doctor had also stated that the injuries on the person of Prem Singh were more than six hours old. The examination of the injured took place at 9:40 am on 01.04.1987. The medical report also did not corroborate the time of incident. He had further pointed out that the F.I.R was subscribed at baldiakhan by jagdish Chandra-PW1. Whereas the injured had stated that the report was written in the house of Sabhapati, i.e., jagdish Chandra. He further pointed out that in the F.I.R., the injured has stated that he was working in his own baranda whereas the entire prosecution case says that the Injured Prem Singh was cutting the fodder in the baranda of Bhawan Singh-PW4. He had further pointed out that the place of occurrence had completely been changed. Learned A.G.A. refuted the contention and pointed out that the discrepancies which have been pointed out by the learned counsel for the appellant is of no consequence. He further contended that these are minor discrepancies and these discrepancies are bound to be there in each and every case which should not be weighed so long as these do not materially affect the prosecution case. learned A.G.A. further pointed out that Prem Singh-PW2 had categorically stated in his

evidence that he had no house in the village. He is the servant of Bhawan Singh-PW4. He had stated in common parlance, he was working in his house. He further pointed out that the defence had not put these contradictions to the witnesses so as to explain as to why he had stated his own house. Learned A.G.A. contended that if this contradiction has not been brought to the notice of the witnesses to explain as provided u/s 145 Indian Evidence Act, it cannot be termed as contradiction. He further pointed out that the witness is a rustic villagers and he is illiterate and he had also stated in his evidence that he does not know the time. He further pointed out that the witness is an injured witness and his presence at the spot cannot be disputed. It is the duty of the court to separated the chaff from the grain. it has to disburse the suspicious cloud and dust out of the smear of dust as all these things clog the very thing. So long chaff, clod and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. so it is a solemn duty of the courts, no to merely conclude and leave the case the moment suspicious are created but it is the onerous duty of the courts to go within the permissible limits to find out the truth. Prem Singh-PW2 is the injured witness. It is also well settled principle of law that the testimony of the injured witness is on a higher pedestal than any of the witness. His presence cannot be doubted at the spot. It is also well settled principle of law that if the testimony of injured witness is taken into consideration and if that testimony is found to be credible and cogent the conviction can be based only on the testimony of the injured witness without any further corroboration. It was pointed out by the learned counsel for the appellant that there is discrepancies with regard to the place of occurrence. He had not put his previous statement of F.I.R. during the cross examination to the witnesses how he had written his own house in the F.I.R. If that contradiction had not been put that cannot be taken into account. It is also relevant that the injured had

no house in the village and it is also in the evidence that he belonged to some other place. He is the servant of Bhawan Singh and lives there so he may very well say in common parlance that appellant shot fire in his varandah. Thus I do not find any inconsistency in between the F.I.R. and the ocular testimony with regard to the place of occurrence. It is no doubt the witness is illiterate and he does not know the exact time. He had stated that he cannot tell about the exact time. When he had stated 10 hrs., it cannot be inferred that the incident occurred at about 2:00 pm. The report was lodged by Jagdish Chandra-PW1 Sabhapati of the village. The witness has not been cross examined whether he lives at Baldiakhan or at the village the injured-Prem Singh was residing. There is no iota of whisper where his house situated thus this isolated & vague statement does not help to the appellant. Prem Singh-PW2 had stated that he was unconscious. Doctor has only stated that his condition was precarious and he was in hospital and there is no whisper of being unconscious in the medical certificate. This may be an exaggeration of the facts stated that he was unconscious. Sometimes the witness are over enthusiasm tells the story in exaggeration. Such exaggeration are always found in the evidence of the villagers in India. Some discrepancies are bound to be there in each and every case which should not be weighed so long as these do not materially affect the prosecution case. When a witness is examined, it is quite possible for him to make some discrepancies. No true witness can possibly escape form making some discrepant details. Perhaps an untrue witness is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of the witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. While appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case ought not to prompt the court to

reject the evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the appellate court would no be justified to receive it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of, and I do not see any justification to pass a contra-note, as well, on perusal of the evidence on record. In this context reference may be made to two decision of Apex Court namely **State of U.P. Vs M.K. Anthony 1985 SCC (Cri) p/105 and Leela Ram Vs. State of Haryana and another 2000 SCC (Cri) p/222.** If an illiterate or rustic witness appears before the court below and is cross examined by skillful or astute lawyer, he may not stand in the cross examination which may sometimes because he is a bucolic person and he is not able to understand the question put to him by a skillful cross examiner under the stress of cross examination. Certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and therefore, minor discrepancies have to be ignored. **(See Krishna Mochi and others versus State of Bihar, reported in 2002 Supreme Court cases (Cri) 1220.** In view of the above discussion, I am of the view that the said discrepancies did not disturb the core of the story of the prosecution. The evidence of the injured is credible and cogent.

11. The evidence of Bhawan Singh-PW4 as indicated above also corroborates the factum that the incident took place but he had denied that he had seen the appellant to fire upon the injured. It is well settled principle of law that the testimony of the hostile witness cannot be discarded in toto. The evidence of hostile witness can also be relied to the extent it supports the prosecution version. It remains admissible in the trial and there is no legal bar to base the conviction on their testimony. In the instant case, the appellant had not made

any cross examination with regard to the factum of the incident. Thus the testimony of the witness on the other point is credible and cogent. The very object of taking evidence it to discover the truth as far at it is humanly possible for the court to do so. The fact, therefore, that sound public policy requires that a party should not be permitted to malign his own witness, cannot and does not absolve the court of its own high duty of attempting to discover the truth. Even when a witness deposes in favour of the case of the party calling him, in such a case, the court has power and duty of deciding whether or not to believe the witness. In the instant case the witness has stated that fire was shot and immediately he fell down on the ground and he sustained the gun shot injuries. The factum of the incident has been proved by the Bhawan Singh-PW4. He had not only supported the prosecution that he saw the appellant to fire upon the injured-Prem Singh. It is also pertinent to mention here that the injured himself had stated that Bhawan Singh-PW4 was sitting in the first floor of his house and he could not see the appellant standing on the road form where he fired upon the injured.

12. Learned counsel for the appellant contended that the sole witness Prem Singh-PW2 had claimed that he had seen the appellant making the fire upon him from the road and it was pointed out the there was no source of light at the spot and the injured could not have recognized the appellant on the road. Learned A.G.A. refuted the contention. It is also in the evidence that the appellant was in the road. It is also in the evidence that fire was shot form a distance of 12-15 paces from where the injured was cutting the fodder. It is also in the evidence of Bhawan Singh-PW4 that there were bulbs in baranda and it is also in the evidence of injured-Prem Singh that there were electric light. It is also in the evidence that there is a forest adjacent to the place of occurrence and it is also in the evidence that there was no light on the road or adjacent to the house.

of Bhawan Singh-PW4. There were 4-5 bulbs in the house and baranda of Bhawan Singh-PW4. If the electric light was there and there was a dark in and around the house, it is sufficient to identify the culprit form a distance of 12-15 paces. I do not find any force in the argument advanced by the learned counsel for the appellant.

13. It was further contended that the prosecution had stated that there is enmity in between Bhawan Singh and the appellant. Bhawan Singh-PW4 had been declared hostile and he had not stated that there is enmity in between them. When he appeared in the witness box rather he tried to support the appellant. The learned counsel for the appellant further contended that the prosecution could not prove the motive against the accused-appellant as such, the appellant is entitled to be acquitted. It is well settled principle of law that if the evidence of witness is reliable, satisfactory and convincing then the absence of motive becomes irrelevant for the decision of the case. It is well settled that establishment of motive is not sine quo non for proving the prosecution case. The prosecution in the present case has not proved the motive. Absence of the motive for crime in my view is of no consequence. The role of the accused persons in the crime stands clearly established. The evidence of the injured is very clear and convincing in this case. it is also well settled law that the establishment of motive is not sine quo non for proving the prosecution case. This court has also held this view in **Yunus Vs. State of M.P. SCC 2003 (1) p/429 and 2004 (2) U.D., 232 Kalbe Ali and another Vs. State of Uttaranchal.**

14. It is also pertinent to mention here that the appellant had not stated any enmity with the injured. The injured must be interested to give his evidence so as to convict the appellant for his wrong doing and he was not like to adopt a course by which some innocent person would be convicted in place of a person really guilty of

causing injuries. It would not be just and proper to discard the evidence of the injured on account that the motive had not been proved by the prosecution. I do not find any merit in the contention advanced by the learned counsel for the appellant.

15. It was pointed out that the prosecution had not proved the recovery of the gun and as such, the accused cannot be convicted. It is also in the evidence that the gun was given to I.O. by the S.D.M. the Investigating Officer had not investigated from where the said gun was received by the S.D.M. The Investigating Officer had also sent the gun to the ballistic expert form where it was reported that the spent cartridges were used by the gun. If the investigation is defective that pales not insignificance when ocular testimony is found credible and cogent. In the case of defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to playing into the hands of the investigating officer it the investigation designedly defective. In the instant case this may be the remissness on the part of the Investigating Officer/ (See **Dhanaj Singh @ Shera and others Vs. State of Punjab 2004 (3) SCC P-654, Chhotu Vs. State of Maharashtra 1997 CRI.L.J. p/4394 (SC), Karnel Singh Vs. State of M.P. 1995 CRL.L.J. p/4173 and Ram Sewak Vs. State of U.P. (2006) 1 SCC (Crl.) 534).** At the most, it can be said that there was recovery of the gun. Non recovery of the gun does not detract from the case of the prosecution where the direct evidence is acceptable. **The Hon'ble Supreme Court in (2000) 9 SCC p/82 in M/s Lakhan Sao Vs. State of Bihar and another** has held as follows:

> *"18. The non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable. Further, PW8 was not*

questioned on the non-recovery of the pistol by the accused. It was not even suggested to PW 6 nor have any of the defence witnesses said that there was any enmity between PW 6 and the accused and that PW 6 had any cause for implicating the accused falsely. No inconsistency has been established in his evidence. The naming of the accused and the detailed account of the incident within a short while of the occurrence in the F.I.R. militates against any suggestion of fabrication."

16. It was further pointed out that the holes of the cartridges were recovered from the place of the occurrence. Learned counsel for the appellant further pointed out that the evidence of the Investigating Officer S.I. Girish Chandra-PW7 who had proved the recovery of spent cartridges had stated that the holes of the cartridges were recovered in presence of the witnesses and it was sealed at the spot and fard was prepared which was read over to the appellant. Learned counsel for the appellant further contended that this recovery cannot be taken into account because the S.I. Girish Chandra-PW7 himself had stated at para 7 of his evidence that he did not know from where the constable brought the box. He further contended that Bhawan Singh-PW4 had not supported the prosecution on this point. He was declared hostile. Perusal of the record reveals that S.I. Girish Chandra-PW7 had stated that the said spent cartridges were recovered and fard was prepared. It is a matter of common experience that in the recent times there has been a sharp decline of ethical values in public life. Even in ordinary cases the witnesses are not inclined to depose. One of the reason may be that they do not have the courage to depose against an accused because of threat to their life, or being neighbor of the accused. It is also seen that a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. Thus the public prosecutor in an ordinary case had to

face with so many odds. The courts while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach in the matters. The I.O. had proved the recovery of spent cartridges. In this case. S.I. Girish Chandra-PW7 is totally credible and cogent with regard to the recovery of spent cartridges. The recovery of the spent cartridges further corroborates the evidence of the prosecution.

17. The evidence of the injured is credible and cogent and the medical evidence also corroborates the evidence of Prem Singh-PW2. Bhawan Singh-PW4 also corroborated the evidence on the point that he heard the noise of gun shot and consequently the injured sustained the gun shot injuries and fell down on the ground. The evidence of Bhawan Singh-PW4 also corroborates the factum of evidence which is relevant under Indian Evidence Act. Apart this, the Investigating Officer has stated that the accused has absconded immediately after the incident and attachment order was passed u/s 82/83 Cr.P.C. from the court and his property was attached and the fard of attachment Ex.Ka.8 is on the record. Thereafter Chargesheet was submitted against the appellant before the court below as absconder. It is well settled position of law that absconding itself is not a circumstance to effect the accused but if the other circumstances and evidence proves the factum of story of the prosecution, then the said circumstances cannot be side stepped as an innocuous circumstances. The appellant had a liberty to explain u/s 313 Cr.P.C. as to why he did not appear before the court below or before the Investigating Officer immediately after the incident. During the questioning u/s 313 Cr.P.C., the appellant instead of making at least an attempt to explain or to clarify the incriminating circumstances of absconding, he took a case of denial. The aforesaid feature of the absconding of the accused cannot be side stepped as an innocuous circumstance. This circumstance of absconding has the

utility to form the link to complete the full chain. (See **Om Prakash Vs. State of Uttaranchal 2003 SCC (Crl) 412).** In this case, the accused committed the murder and thereafter absconded. The Hon'ble Apex Court held at para 10 of the judgment that one of the circumstance born in mind is that the appellant absconded and he was apprehended after five years. There was no apparent explanation of this.

18. In view of the above discussion, I am of the view that the prosecution has established the guilt beyond reasonable doubt against the appellant. I find that the learned Sessions Judge had rightly convicted and sentenced the appellant and there is no infirmity in the judgment passed by the learned Sessions Judge. Hence, the appeal is dismissed and the conviction and sentence awarded by the trial court against the appellant are confirmer.

19. Let the record of the court below be sent to the trial court alongwith a copy of this judgment immediately

20. All applications pending in this case are stand disposed of in terms of the judgment.

(J.C.S.Rawat, J.)

19th May, 2006
Shiv